NO. 3903

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

D. C. AUSTIN,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE.

The complaint alleges in substance that the defendant in error was Master of the American steamship "Cross Keys." That on or about the 19th day of May, 1922, the said steamship "Cross Keys" arrived at the Port of Seattle in the Northern Division of the Western District of Washington, from a foreign port; that after the arrival of the said steamship "Cross Keys" the defendant, as Master of said vessel, filed with the Collector of Customs at the

Port of Seattle certain manifests and store lists, purporting to be complete and correct manifests and store lists of merchandise on board said vessel; that thereafter, at the Port of Seattle, Customs Inspectors of the United States found on board of said vessel certain liquor which had not been manifested and which did not appear on the store lists of said vessel, and that thereafter a penalty under section 2809, Revised Statutes, equal to the appraised value of the liquor, to-wit, $73.00, was assessed against said defendant in error by the Collector of Customs; that, upon demand, the defendant in error refused to pay this sum. The prayer of the complaint asked judgment against the defendant in the sum of $73.00, being the penalty theretofore assessed by the Collector of Customs for the failure of the Master to manifest the liquor. To the complaint the defendant in error filed his demurrer upon the ground and for the reason that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the district court and the Government electing to stand on its complaint and refusing to plead further judgment of dismissal was thereafter entered.

This writ of error is prosecuted from said judgment.

ARGUMENT.

The only question involved is the correctness of the ruling of the trial court in sustaining the demurrer of the defendant in error and dismissing the action. Section 2809, Revised Statutes, reads as follows:

> "If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

The question involved in this case is identical with the issues presented to the court in the case of *United States v. Olaf O. Hana*, 276 Fed. 817, where in an identical case this court affirmed the ruling of the trial court in sustaining a demurrer to a similar complaint. Upon instructions from the Attorney General, this matter is again presented to this court for consideration for the reason that it is believed that all of the authorities touching the question were not presented to the court at the time of the submission of the *Olaf O. Hana* case. With the

Court's indulgence, therefore, it is deemed advisable to further present to the court certain authorities not urged by the Government at the hearing of the other cause and which are believed to have a decided bearing upon the issues presented.

(1) The first question, of course, involved is whether or not intoxicating liquor falls within the meaning of the word "merchandise" as used in section 2809, Revised Statutes, and the case further calls for a construction of section 2766, Revised Statutes, defining "merchandise" and a construction in particular of the words "capable of being imported," the court holding in *United States v. Sischo*, 270 Fed. 958, and, in substance, to the same effect in the *Olaf O. Hana* case, that those words must be construed to mean "legally capable of being imported."

The authorities below are cited as supporting the Government's contention that the fact that the importation of an article which would otherwise be undoubtedly "merchandise" is prohibited, and that this prohibition is sanctioned by a penalty upon the person importing it or selling it after importation, cannot change the actual nature of the article itself, which is the important thing in view of the statutes.

If it be said that the articles whose importation is prohibited are not on that account "merchandise," it would seem that the principle would have to be extended also to the importation of articles without the payment of duty thereon, or without complying with other provisions of the customs revenue laws. It does not seem that it could possibly be said that articles which were fraudulently brought into the country without the payment of duties were not "merchandise" on account of their unlawful importation, and yet the bringing of them in in that manner is punished and subjects the goods to forfeiture. They are not "legally capable of being imported" any more than articles whose importation is prohibited, since they can only be legally imported by the payment of the duties, a condition which has not been performed.

Attention is called at this point to what seems to the Government to be a distinction between the issues involved in the case of *United States v. Sischo, supra,* and the instant case; and while the court did not overlook this contention in its decision in the *Olaf O. Hana* case, we believe that the contention is entitled to further consideration by the court. The importation of intoxicating liquor, unlike smoking opium, is not absolutely prohibited but may be im-

ported, and brought into the country under the mode and procedure prescribed in the National Prohibition Act. Not only must the duties be paid upon the liquor at the time of its importation, but the proper permits must be obtained for the importation. It is submitted that in view of the procedure adopted in the Prohibition Act for the legal importation of liquor, that it must be held to be "merchandise" in view of its capacity for legal importation. There can be no question but that the failure to pay duty upon goods which can be legitimately imported would not be held to take from those goods their character as "merchandise," and similarly that the failure to comply with the other step necessary, that is, to follow the procedure outlined in the Prohibition Act with relation to the securing of a permit, cannot be said to render the intoxicating liquor contraband so as to be excluded from the term "merchandise." The following authorities are cited to the effect that prohibited articles are none the less merchandise, but which authorities do not appear to be contained in the brief of the Government in the *Olaf O. Hana* case.

Section 3082 of the Revised Statutes provides that if any person shall fraudulently or knowingly import or bring into the United States any mer-

chandise contrary to law, he shall be punished and the merchandise forfeited.

In *United States v. Thomas*, 4 Ben. 370, 373-375, Fed. Cas. No. 16473, it was held that this section did not apply at all to goods imported without the payment of duties, but applied only to goods imported in a manner or form contrary to law or whose importation was altogether forbidden, thus expressly holding that goods whose importation was forbidden were nevertheless merchandise within the meaning of section 3082, Revised Statutes. A ruling to precisely the same effect was made in *United States v. Claflin*, 13 Blatch, 178, 186, Fed. Cas. No. 14798. In *United States v. Kee Ho*, 33 Fed. 333, 335, Judge Deady said of section 3082, Revised Statutes:

> "The section of the statute under which this indictment is drawn is intended, as the title of the act from which it is compiled indicates, to prevent smuggling, or clandestine introduction of goods into the United States without passing them through the customhouse, and with intent to defraud the revenue of the United States. But its language is broad enough to include, and does include, every case or form of illegal importation, even where the intent to avoid the payment of duties does not exist, as the bringing in of prohibited goods or goods packed in prohibited methods."

In *Estes v. United States*, 227 Fed. 818, it appeared that the Secretary of Agriculture had made a regulation, under the animal quarantine act, to the effect that no cattle should be imported into the United States from the Republic of Mexico without inspection by an inspector of the Bureau of Animal Industry and a finding that they were free from disease. The defendants had imported certain cattle into this country (such cattle not being dutiable under the customs laws) without the requisite inspection, and they were indicted for a violation of section 3100, Revised Statutes, which prohibits the importation of merchandise and all other articles without inspection by an officer of the customs, and of section 3082, Revised Statutes, referred to above. It was held that both sections had been violated, that is, that such cattle, although prohibited from importation into this country without inspection under the quarantine act, were nevertheless "merchandise" imported into this country, if the owners thereof succeeded in avoiding the quarantine inspectors.

In *Daigle v. United States*, 237 Fed. 159, 163, 165, it appeared that the Secretary of Agriculture had promulgated a quarantine against potatoes from Canada, and certain potatoes were libeled for a violation of section 3082, Revised Statutes,

and 3100, Revised Statutes, referred to above, in that they had been imported from Canada, contrary to law, and without inspection by the customs inspectors. The Court of Appeals for the First Circuit held that, if the libel had alleged that the goods had been knowingly brought into the United States contrary to law because their importation was prohibited under the order of the Secretary of Agriculture, there would be little doubt that the potatoes would be subject to seizure and condemnation under section 3082, Revised Statutes, holding, however, that this section was not applicable on account of the lack of the necessary allegations in the libel. The Court of Appeals went on to hold that the importation, nevertheless, under the circumstances, was a violation of section 3100, Revised Statutes, the court saying:

> But the contention is made that the potatoes here in question were not subjects of import even as nondutiable articles, for their importation was prohibited under the plant quarantine act and the order of the Secretary of Agriculture, and the question is whether the provisions of section 3100 apply to merchandise the importation of which is prohibited, and require that it, on being brought "into the United States from any contiguous foreign country, * * * shall be unladen in the presence of,

and be inspected by, an inspector or other officer of * * * customs at the first port of entry or customshouse in the United States where the same shall arrive." Although merchandise, the importation of which is expressly prohibited can not lawfully be imported, it does not follow that its introduction into the country will not also be contrary to the provisions of section 3100 if not submitted for inspection, so that it may be excluded. The provisions of section 3100 are broad in their terms. They contemplate that "all merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country" shall be subjected to inspection at the first port of entry or customhouse in the United States where the same shall arrive, with the single exception provided for in section 3102 (Comp. St. 1913, sec 5814), which has nothing to do with this case.

We are therefore of the opinion that all merchandise introduced into this country from Canada, whether subject to duty, free from duty, or the importation of which is prohibited, is introduced in violation of law if not submitted for inspection as required by section 3100, and that the District Court was right in ruling that the plant quarantine act and the order of the Secretary of Agriculture did not constitute a defense to the libel as applied to the fourth count.

In *Feathers of Wild Birds v. United States*, 267

Fed. 964, section 3082, Revised Statutes, was expressly applied to articles whose importation into this country is absolutely prohibited, the Court of Appeals for the Second Circuit saying:

> We think that, where goods forbidden of importation are physically brought into the country as such prohibited articles, they are in fact imported within the meaning of the act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute.

The most important decision, however, upon the subject, and one which seems to have a decided bearing on the case at bar in all its aspects, is the unanimous opinion of the Supreme Court, delivered by Mr. Justice Story, in the case of *Harford v. United States*, 8 Cranch, 109. As the opinion is short, it is quoted in full:

> The principal question in this case is whether goods and merchandise, the importation of which into the United States was prohibited by the Act of 18th of April, 1806, vol. 8, p. 80, were within the purview of the 50th section of the collection act of 2d of March, 1799, vol. 4, p. 360, so that the unlading of them without a permit, etc., was an offence subjecting them to forfeiture.
>
> It has been contended on behalf of the claimant that they were not within the purview of

the 50th section, because that section applies only to goods, wares, and merchandise, the importation of which is lawful. To this construction the court can not yield assent. The language of the 50th section is, that "no goods, wares, or merchandise, etc., shall be unladen, etc., without a permit;" it is therefore broad enough to cover all goods, whether lawful or unlawful. The case, being then within the letter, can be extracted from forfeiture only by showing that it is not within the spirit of the section. To us it seems clear that the case is within the policy and mischief of the collection act, since the necessity of a permit is some check upon unlawful importations, and is one reason why it is required. The act of 1806 does not profess to repeal the 50th section of the collection act as to the prohibited goods, and a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable. No such manifest repugnance appears to the court. The provisions may well stand together and indeed serve as mutual aids.

In fact the very point now presented was decided by this court in the case of *Locke, claimant, v. The United States*, at February term, 1813.

It will be seen that the court in this opinion distinctly holds that articles, whose importation into this country is absolutely prohibited, are, nevertheless, "goods, wares and merchandise" within the

meaning of the customs revenue acts. It is submitted, therefore, that both on principle and authority the word "merchandise" in section 2809, Revised Statutes, cannot be limited, either by reason of its ordinary meaning, or by reason of the provisions of section 2766, Revised Statutes, so as to exclude from its scope articles whose importation into this country is absolutely prohibited and *a fortiori*, articles, which, by express provisions of the law, are legally capable of being imported.

(2) A further question would seem to be involved in the instant case, and that is whether or not, where articles whose importation into this country is absolutely prohibited, or whose importation is restricted, are nevertheless physically brought within the territorial limits of this country, they can be said to have been brought into the country within the meaning of section 2809, Revised Statutes.

The statutes generally use the word "import," and it would seem that clearly the words "brought into" are added to the word "imported" so as to broaden its meaning and include cases where a technical importation might be said not to have taken place. The word "importation" as used in the customs revenue laws is thus defined by the

United States Supreme Court in *Arnold v. United States*, 9 Cranch 104, 120:

> It is further contended that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry.

It will be observed that nothing is said in this decision as to the character of the articles being material, that is, whether they are articles whose importation is forbidden or restricted, or not.

In the cases referred to above, namely, *United States v. Thomas*, *United States v. Claflin*, and *United States v. Kee Ho*, it was held that there could be an "importation" of prohibited articles within the limited meaning of that word as used in the customs revenue statutes. In the case of *The Schooner Boston*, 1 Gallison, 239, Fed. Cas. No. 1670, it appeared that the schooner came into the port of Boston having on board certain goods whose importation into this country was absolutely prohibited under the President's proclamation made pursuant to the embargo act. It was claimed that

the vessel had come into the port of Boston merely to find out whether the goods could be lawfully brought into this country or not and that, after finding that they could not be lawfully imported, the destination of the vessel had been changed to a foreign country. Mr. Justice Story held, nevertheless, that this was an importation into the United States, and that the vessel and the cargo were subject to forfeiture. After pointing out expressly that the importation of these goods was absolutely prohibited, Justice Story said:

> The cargo was taken on board with the intention to be imported, and was actually imported into the United States.

If the physical bringing into this country of prohibited articles may be (as the authorities above show it is) an "importation," it follows *a fortiori* that such a physical transportation of the prohibited articles into this country would constitute a bringing in of them within the meaning of section 2809, Revised Statutes. The words "bring into" or "brought into" are evidently broader words than "import into," and must have been used by Congress for the very purpose of covering the illegal transportation of goods into this country where a technical importation into a port of entry has not taken place.

(3) The third question involved in the case at bar would seem to be whether there is any duty to manifest prohibited articles within the meaning of section 2809, Revised Statutes. It is submitted that here, too, the manifesting of prohibited articles is within both the letter and spirit of section 2809, Revised Statutes.

The word "manifest" is apparently a somewhat modern one. In Lord Hale's Treatise Concerning the Customs (Hargrave's Law Tracts, pp. 219, 220), it is said that the master is obliged to give an account to the revenue authorities of the goods under his charge, and to make a just and true entry of certain matters, which, it seems to be supposed, he will obtain from the bills-of-lading. In the Oxford dictionary the following definition of the word "manifest" is given:

> The list of the ship's cargo, signed by the master, for the information and use of the officers of customs.

The first citation of the word, however, with this meaning appears to be in 1744, and an earlier citation of it in 1706 reads as though the manifest was merely a draft of the cargo, showing what is due for freight. At any rate, the modern meaning of it, as used in the customs revenue acts, is undoubtedly

that given in the Oxford dictionary, viz., a list of the ship's cargo for the information and use of the officers of customs.

The contents of the manifest are prescribed in great detail in section 2807 of the Revised Statutes as amended. The third paragraph (being the important one to the case at bar) provides that the manifest shall contain

> "A just and particular account of all the merchandise, so laden on board" (that is, laden on board in a foreign port), "whether in packages or stowed loose, of any kind or nature whatever."

There is nothing in this language to indicate articles whose importation is prohibited are not to be included. Indeed, it seems evident that they are included within the letter of the statute which includes all merchandise of every kind whatsoever, and makes no exceptions. It should be observed also that the manifest must contain an account of the sea stores on board the vessel, although such articles are not merchandise, are not imported, and are not subject to duties.

It is submitted that articles whose importation into this country is prohibited are within the letter of sections 2806, 2807 and 2809, Revised Statutes,

and must be included in the manifest as prescribed by those sections unless some strong reason exists to take them out of the spirit of the statute, so that to apply the statute to them would work an absurdity or an injustice.

It is to be observed that the manifest is prescribed by the statutes for the information and use of the officers of the customs. If the duties of such officers were confined solely to the collection of revenues upon importations, there would be great force in the argument that to require the manifest to include prohibited articles would be an injustice and an absurdity. The duties of customs officers, however, are not so limited. In fact, they are the general guardians and custodians of the boundary lines of this country, and it is part of their duty to protect those boundaries from transportation across them of any articles brought in in a manner prohibited by law, no matter whether the illegality consist in a violation of the customs laws or not. This can be clearly seen from the fact that sections 4197, 4198, 4199 and 4200 of the Revised Statutes expressly require manifests of outward bound cargoes. Evidently this requirement can have nothing to do with the collection of customs duties and shows clearly that Congress intended that the customs

officers should have complete information for all purposes of every article of merchandise contained in vessels coming to or going from this country.

Consequently, this has been in effect the holdings of the courts. In *United States v.* 50 *Waltham Watch Movements*, 139 Fed. 291, 299, 300, it was held that goods which were not dutiable must, nevertheless, be declared to the customs officers. The same rulings were in effect made in *United States v. Burnham*, 1 Mason 57, 63; in *Jackson v. United States*, 4 Mason 186, 190; and in *United States v.* 20 *Cases of Matches*, 2 Biss. 47, 50, it was held that a permit was necessary for unloading goods transported from one place in the United States to another but through a foreign country, although the goods were not subject to duty. In *Goldman v. United States*, 263 Fed. 340, 343, the court said, in making a similar ruling to the effect that nondutiable goods, nevertheless, could not be unladen without a permit:

> We think section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regula-

> tions relating to the introduction of merchandise into the country, other than the ultimate one requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them, but to make disobedience of them criminal.

An even more direct authority is the case of *Daigle v. United States*, 237 Fed. 159, 163, 165, referred to above, where it was held that section 3100, Revised Statutes, which provides that all goods imported into the United States from any contiguous foreign country shall be unladen in the presence of and be inspected by an officer in the customs applied to articles whose importation into this country was prohibited. It seems impossible to distinguish between the requirement of a manifest under section 2809, Revised Statutes, and the requirement of inspection under section 3100, Revised Statutes.

But the Government relies mostly on this phase of the case, as well as on the other phases of it, on the decision of the Supreme Court in *Hartford v. United States*, 8 Cranch 109, referred to above. In that case it was held that articles whose importation was prohibited were subject to the provisions

of the customs laws prohibiting an unloading without a permit. Every reason which can be urged against the requirement of a manifest as to prohibited articles could be equally well used against the requirement of a permit for unloading. In the latter case it could be equally well said that the master could not be expected to ask a permit to unload goods whose importation was prohibited, and that to require him to do so would be to require him to convict himself of an offense. Nevertheless, the Supreme Court held that the requirement was necessary in the case of prohibited articles as in the case of other articles for the reason that the customs officers were entitled to full information in regard to all articles brought into this country as a matter of fact whatever their nature might be, or whether their importation was permitted or prohibited.

It is difficult to see why, if the manifest be of no importance as to prohibited articles, it is not equally of no importance in regard to articles imported into this country without the payment of duties which have legally accrued upon them. Suppose that the defendant, in the case at bar, instead of intending to bring into this country for sale prohibited articles, intended to smuggle in articles whose importation was permitted, without the payment of

the duty thereon. It would seem that in the latter case, just as much as in the former, he would have no inclination to manifest the articles, and, if he did manifest them, his very act of so doing would tend to convict him of the crime of smuggling. If, therefore, it be unnecessary for him to manifest prohibited articles, it is difficult to see why it should be necessary for him to manifest articles which he intends to smuggle into this country. Yet, of course, his duty to manifest in the latter case is entirely clear and would, no doubt, be admitted by everyone. The argument on the other side appears to be that, since the manifest is required for the purpose of preventing the importation into this country contrary to law of merchandise, therefore the manifest should only include those articles whose importation is intended to be lawful. The object of section 2809 is to penalize the bringing in of articles to this country contrary to law by providing that, if they do not appear upon the manifest, they shall be forfeited and the master of the vessel shall pay a penalty. It is their absence from the manifest which is important, not their presence on it. The duty to manifest everything is placed upon the master, and the dereliction of that duty is made punishable, no matter that it is inconceiv-

able that the master, under the circumstances, would perform the duty.

It is, therefore, submitted that upon the authorities cited, especially those from the Supreme Court, that the complaint does state a cause of action, that the court was in error in sustaining a demurrer and that the judgment of the trial court in dismissing the action should be reversed, with instructions to overrule the demurrer.

Respectfully submitted,

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